Supreme Court, U.S.
FILED

No. _____

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In The

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Supreme Court of the United States

BRONCO WINE COMPANY, a California corporation,

Petitioner,

v.

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS; JOHN W. MAGAW, Director of the Bureau of Alcohol, Tobacco and Firearms,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Judicial review of agency compliance with United States law is available under the Administrative Procedure Act unless a statute precludes it. Congress precluded judicial review of an agency's implementation of (or failure to implement) the trade agreements known as the Uruguay Round Agreements (Agreements). Simultaneously, Congress itself implemented the Agreements by amending hundreds of federal statutes. Does the bar to review of agency compliance with the Agreements themselves also preclude judicial review of an agency's failure to comply with one of these statutes as amended?

LIST OF PARTIES/RELATED ENTITIES

In addition to Petitioner, the parties to this petition are the Bureau of Alcohol, Tobacco and Firearms and its Director, John W. Magaw. S.Ct.R. 21.1(b).[1]

[1] The other individual defendants named below are not parties to this petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bronco Wine Company asks this Court to review by certiorari the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on February 11, 1999. The Ninth Circuit denied a petition for rehearing on April 13, 1999.

OPINION BELOW

The district court's opinion is reported. *Bronco Wine Co. v. Bureau of Alcohol, Tobacco & Firearms*, 997 F.Supp. 1318 (E.D.Cal. 1997). The unpublished opinion affirming the judgment of the district court, *Bronco Wine Co. v. Bureau of Alcohol, Tobacco & Firearms*, No. 98-15444, 1999 WL 68632 (9th Cir. Feb. 11, 1999), and the order denying a petition for rehearing, *id.* (9th Cir. Apr. 13, 1999), are attached as an appendix to this petition.

JURISDICTION

This Court has jurisdiction to entertain this petition for a writ of certiorari from a final judgment of a Circuit Court of Appeals. 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves provisions of the Administrative Procedure Act, the Uruguay Round Agreements Act, the Lanham Trademark Act, and a regulation of the

Bureau of Alcohol, Tobacco and Firearms concerning geographic brand names on wine labels.

The Administrative Procedure Act provides in part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof.

5 U.S.C. § 702.

> This chapter [providing for judicial review] applies . . . except to the extent that – [¶] statutes preclude judicial review. . . .

5 U.S.C. § 701(a)(1).

The Uruguay Round Agreements Act provides in part:

> No person other than the United States –
>
> shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> may challenge, in any action brought under any provision of law, any action or inaction by any . . . agency . . . of the United States . . . on the ground that such action or inaction is inconsistent with such agreement.

§ 102, Pub.L. 103-465, 108 Stat. 4815, codified at 19 U.S.C. § 3512(c)(1).

The Lanham Trademark Act provides in part:

> No trademark . . . shall be refused registration . . . unless it . . . [¶] [c]onsists of . . . a

> geographical indication which, when used on or in connection with wines . . . identifies a place other than the origin of the goods and is first used on or in connection with wines . . . by the applicant on or after one year after the date on which the WTO Agreement (as defined in Section 3501(9) of Title 19) enters into force with respect to the United States [January 1, 1996].

15 U.S.C. § 1052(a).

Title 27 of the Code of Federal Regulations provides in part:

> [A] brand name of viticultural significance may not be used unless the wine meets the appellation of origin requirements for the geographic area named. [Except for] brand names used in existing certificates of label approval issued prior to July 7, 1986. . . .

27 C.F.R. §§ 4.39(i)(1) & (2).

STATEMENT OF THE CASE

A. Summary of Material Facts

"Rutherford" is a small town in California. "Rutherford Vineyards," a trademark belonging to Petitioner Bronco Wine Company (Bronco), has been used as a brand name on wines since 1968. In 1993, Respondent Bureau of Alcohol, Tobacco and Firearms (ATF) designated a six thousand acre section of California's Napa

Valley as the "Rutherford" American viticultural area (AVA).[2] 27 C.F.R. § 9.133.

Beginning in 1995, ATF issued a series of certificates of label approval (COLAs)[3] approving Bronco's use of labels bearing the "Rutherford Vineyards" mark and a California appellation of origin (*e.g.*, "Rutherford Vineyards California Chardonnay"). Under ATF regulations, these COLAs allowed Bronco to use the mark on wine made from grapes grown in any two or more counties in California, rather than limiting its use to grapes grown in the Rutherford viticultural area. See 49 Fed.Reg. 19330, 19332 (May 7, 1984) (ATF proposed rulemaking).[4]

Bronco began to market significant quantities of "Rutherford Vineyards" wine made from grapes grown in two or more California counties. Despite its earlier approval, ATF summarily detained 32,000 cases of "Rutherford Vineyards" wine in October of 1996 and forbade its sale.

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[2] ATF allows any interested person to petition for recognition of an AVA, which ATF defines as a geographic area of viticultural significance. 27 C.F.R. § 4.25a(e)(2)(i).

[3] ATF requires anyone wishing to sell alcoholic beverages in interstate or foreign commerce to first obtain a COLA. 27 U.S.C. § 205.

[4] A grape variety on a wine label must include an appellation of origin describing where the grapes were grown. 27 C.F.R. § 4.34(b). ATF allows state appellations if 75% of the wine grapes are grown in two or more counties in the state. For AVAs, the percentage increases to 85%. 27 C.F.R. §§ 4.25a(b)(1)(i) & (e)(3)(ii). These percentages are not relevant here and Bronco will refer only to "the place where the wine grapes were grown" for simplicity.

According to ATF, use of the "Rutherford Vineyards" mark violated its geographic brand name regulations (27 C.F.R. § 4.39(i)) because, in ATF's view, the mark contained the word "Rutherford" which corresponded to a place name in an AVA recognized by ATF, the wine grapes were not grown in the Rutherford AVA, and the mark did not qualify under ATF's grandfather date of July 7, 1986.[5]

ATF warned Bronco that future wine sales under the Rutherford Vineyards mark would be considered a willful violation of Bronco's basic permit to engage in the wine business (which could lead to the permit's revocation) unless the grapes were grown in the Rutherford AVA. Bronco could not comply with these conditions and has been precluded from using its trademark.

B. Summary of Procedural History

Bronco filed a complaint in the United States District Court for the Eastern District of California seeking a declaratory judgment under the Administrative Procedure Act (APA) reasoning as follows:

Congress determined in the Lanham Trademark Act (Lanham Act) that geographic trademarks on wine labels

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[5] As noted, "Rutherford Vineyards" has been used on wine since 1968. ATF, however, placed upon *Bronco* the burden of demonstrating that the mark was in use on or before July 7, 1986, pursuant to an approval *issued by ATF*. Bronco has been unable to meet this burden, in large part because *ATF itself has no records of approvals for 1986 or earlier.* In short, ATF cannot demonstrate it did not approve use of the mark on a wine label before the grandfather date.

which did not describe the origin of the wine grapes could be registered (and could continue to be used) so long as those marks were in use on January 1, 1996.[6] 15 U.S.C. § 1052(a). "Rutherford Vineyards," which did not describe the source of the wine grapes and which was legally in use on January 1, 1996 (pursuant to an approval issued by ATF), qualified for continued use under the grandfather clause chosen by Congress.

ATF's regulations dealing with precisely the same subject – geographic brand names on wine labels that do not correspond to the origin of the wine grapes – contained a July 7, 1986 grandfather date, a date nearly ten

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[6] The legislative history of Section 1052(a) makes clear that Congress intended that qualifying marks could continue to be used whether eventually registered or not.

> Section 522 of the implementing bill amends section 2 of the Trademark Act of 1946 [15 U.S.C. § 1052(a)] to provide that trademarks that consist of, or comprise, a geographical indication for wines or spirits that do not in fact originate in that geographic area will be refused registration if the mark was first used after the WTO Agreement has been in effect for one year. Any trademark consisting of a geographic indication that is currently registered *or in use*, or that is registered *or in use* during the period before the WTO Agreement has been in effect for a year, *may be maintained*.

Statement of Administrative Action, 1994 U.S. Code Cong. & Admin. News 4040, 4294 (emphasis added). This intent is consistent with the principle that a trademark is "a common law property right that exists independently of statutory provisions for registration." *Sweetarts v. Sunline, Inc.*, 380 F.2d 923, 926 (8th Cir. 1967).

years earlier than that chosen by Congress. Because of this conflict between ATF's regulation and Congressional intent, ATF's regulation was "arbitrary, capricious . . . or otherwise not in accordance with law [the Lanham Act]. . . . " 5 U.S.C. § 706(2)(A).[7]

Neither the district court nor the court of appeal reached the merits because they failed to distinguish between an international agreement approved by Congress and implementation of that agreement by Congress through the affirmative amendment of United States law (here, the Lanham Act). Both courts found that restrictions on judicial review of agency action for compliance with the international agreement extended to bar judicial review of agency compliance with the Lanham Act because Congress had amended it to implement that agreement. Neither court recognized that once Congress

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[7] If ATF's regulations rendered use of a geographic mark on a wine label that did not describe the origin of the wine grapes illegal, that mark could not be registered despite a clear statement of Congressional intent in the Lanham Act that this characteristic would not prevent registration. *See Gray v. Daffy Dan's Bargaintown*, 823 F.2d 522, 525-26 (Fed.Cir. 1987). The legislative history of the amendment to the Lanham Act recognizes the need for ATF to modify its regulations governing wine labels: "The United States *will implement* the Agreement's provisions on geographical indications for wine and spirits *through the labeling regulations of the Bureau of Alcohol, Tobacco and Firearms* of the Department of the Treasury. The Agreement specifically recognizes that the rights in geographic indications for wine and spirits may be enforced through administrative action." Administrative Action, 1994 U.S. Code Cong. & Admin. News at 4299 (emphasis added).

amends a statute to implement an international agreement, in legal contemplation the corresponding terms of the international agreement no longer exist.

In granting ATF's motion to dismiss Bronco's APA claim, the district court interpreted the bar to any private right of action under the Uruguay Round Agreements (Agreements) and the Uruguay Round Agreements Act (the Act) to extend as well to any action under the APA alleging non-compliance with a statute Congress had amended to implement the Agreements – "the provision of the Uruguay Round Agreements Act which strips private plaintiffs of a cause of action trumps the Administrative Procedures [sic] Act's grant of a cause of action." *Bronco Wine Co. v. Bureau of Alcohol, Tobacco & Firearms*, 997 F.Supp. 1318, 1322 (E.D.Cal. 1997).

The Court of Appeals affirmed on slightly different grounds. While noting the bar to any private right of action under the Agreements or the Act, the Court of Appeal found review was precluded under the APA "because the APA specifically excludes review when a statute precludes judicial review." *Bronco Wine Co. v. Bureau of Alcohol, Tobacco & Firearms*, 1999 WL 68632 (9th Cir. Feb. 11, 1999). Although not entirely clear in its reasoning, the Court of Appeal appeared to conclude not only that the "no private right of action" clause in the Act precluded judicial review of ATF's compliance with the Lanham Act, but the bar to judicial review of ATF's compliance with the Agreements themselves extended to statutes such as the Lanham Act that were amended to implement the Agreements.

Bronco petitioned for rehearing, noting that the APA itself provided a private right of action and that any barrier to a private right of action in the Act was not a statute precluding judicial review under the APA. The Court of Appeal summarily denied rehearing on April 13, 1999.

REASONS FOR GRANTING REVIEW

This Case Presents An Issue Of First Impression – When Congress Precluded Judicial Review Of Agency Compliance With A Trade Agreement, Did Congress Also Intend To Preclude Judicial Review Of Agency Compliance With A Statute That Congress Itself Amended To Implement The Agreement?

The APA provides a "private right of action" to "persons aggrieved by agency action." 5 U.S.C. § 702. *See generally Heckler v. Chaney*, 470 U.S. 821, 828-30 (1985). A plaintiff need not establish a private right of action under a statute in order to seek relief under the APA. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 317-19 (1979). There is a strong presumption that agency action is subject to judicial review under the APA. *See generally Gutierrez De Martinez v. Lamagno*, 515 U.S. 417, 424 (1995).

Judicial review is not available under the APA, however, if a statute precludes it. 5 U.S.C. § 701(a)(1). The intent to preclude judicial review is found only when "[a] clear command of the statute," *Barlow v. Collins*, 397 U.S. 159, 167 (1970), provides that agency action cannot be reviewed by a Court. "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent

should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). *See, e.g., Briscoe v. Bell*, 432 U.S. 404 (1977) ("shall not be reviewable in any court" suffices).

In reviewing agency action under the APA, a court is to determine if the agency's acts are contrary to law. 5 U.S.C. § 706(2)(A). The "law" at issue need not necessarily be the statute the agency administers (here, the Federal Alcohol Administration Act, 27 U.S.C. §§ 201 *et seq.*), since agencies are required to adjust their acts to the will of Congress expressed in other statutes.

> Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

See Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942). *See generally Sure-Tan v. NLRB*, 467 U.S. 883 (1984); Jaffe, *Judicial Control of Administrative Action* 590 (1965).

The APA provides Bronco with a cause of action to challenge ATF's failure to conform its regulations to the Lanham Act. Still, neither Court below reached the merits of this claim because both found that a statute precluded judicial review under the APA. The statute both courts relied upon was the Uruguay Round Agreements Act (the Act).

The district court relied on the Act's provision that no individual "shall have any cause of action or defense under any of the Uruguay Round Agreements or by

virtue of congressional approval of such an agreement. . . . " 19 U.S.C. § 3512(c)(1)(A).[8] The bar to a private right of action does not bar judicial review – an affected person may obtain judicial review of agency action under the APA despite the fact that there is no private right of action under the statute challenged. *See Chrysler Corp.*, 441 U.S. at 317-19.

The more plausible reason for finding judicial review was precluded here is the one provision in the Act that does speak directly to judicial review of agency action, providing that no one "may challenge, in any action brought under any provision of law, any action or inaction by any . . . agency . . . of the United States . . . on the ground that such action or inaction is inconsistent with such agreement." 19 U.S.C. § 3512(c)(1)(B). "Such agreement" in subsection (B) refers to the Uruguay Round Agreement (hereafter "Agreements") mentioned in subsection (A). Subsection (B) therefore in plain language precludes only judicial review of agency action on the grounds that it is inconsistent with the *Agreements themselves*. Subsection (B) is silent as to review of agency action inconsistent with federal laws Congress itself amended to implement the Agreements.

Given the strong presumption favoring judicial review, silence on this subject is not enough to preclude judicial review. Both courts below simply failed to distinguish between the Agreements, which Congress did not

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[8] This subsection reiterates that the Agreements did not become federal law of their own force, *i.e.*, that they were not self-executing. 19 U.S.C. § 3512(a)(1).

intend to become self-executing federal law, and the modifications to United States law that Congress itself made to implement the Agreements, which were indisputably intended to become binding federal law. While Congress has clearly precluded judicial review of an agency's failure to comply with the Agreements themselves, it has just as clearly not precluded judicial review of an agency's failure to comply with federal laws Congress enacted to implement the Agreements. This straightforward conclusion is consistent with principles of law governing treaties and other international agreements as well as the legislative history of the Act.

Treaties and other international agreements, such as the trade agreement at issue here, are the supreme law of the land. U.S. Const. Art. IV, § 2. *See generally* Henkin, *Foreign Affairs and the Constitution* 173-88 (1972). These agreements are not necessarily "self-executing" – they frequently require Congressional implementation through amendments to United States statutes before they actually attain the status of law. *See id.* at 156-61. Statutes amended to implement these agreements supersede corresponding provisions of the original agreement, the amended statutes become the law of the land, and, for purposes of United States law, the superseded international obligations no longer exist.[9] *See, e.g., The Chinese*

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[9] Had the Agreements' wine trademark provisions been self-executing, they would still have ceased to exist because Congress adopted them in altered form. Article 23 provides that geographic indications for wine which do not originate in the location indicated could not be used or registered. Article 24 created an exception for marks in use for ten years before April 15, 1994, but signatories were not required to impair rights

Exclusion Case, 130 U.S. 581 (1889); *The Head Money Cases*, 112 U.S. 580 (1884). The legislative history of the Act recognizes these principles.

> Section 102 [of the Act] establishes the relationship between the Uruguay Round agreements and U.S. law. The implementing bill, including the authority granted to federal agencies to promulgate implementing regulations, is intended to bring U.S. law fully into compliance with U.S. obligations under those agreements. The bill accomplishes that objective with respect to federal legislation by amending existing federal statutes that would otherwise be inconsistent with the agreements and, in certain instances, by creating entirely new provisions of law.
>
> As Section 102(a)(1) clarifies that no provision of a Uruguay Round agreement will be given effect under domestic law if it is inconsistent with federal law, *including provisions of federal law enacted or amended by the bill.* Section 102(a)(1) will not prevent implementation of federal statutes consistently with the Uruguay Round agreements, where permissible under the terms of such statutes. *Rather, the section reflects the Congressional view that necessary changes in federal statutes should be specifically enacted rather than provided for in a blanket preemption of federal statutes by those agreements.*

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acquired before the Agreements became effective. *Id. See* Administrative Action at 4282-83. In amending the Lanham Act, Congress eliminated the ten year continuous use requirement and changed the grandfather date to one year after the Act became law.

Administrative Action, 1994 U.S. Code Cong. & Admin. News at 4050 (emphasis added).

Given the limitations on a private right of action and judicial review in the Act, it is apparent that Congress intended that the Agreements would be implemented into United States law only to the extent Congress chose to implement them. Once Congress acted to implement the Agreements, the statutes modified or added as a result became the governing law. As to those statutes, the Agreements had no force, independent or otherwise, for Congress had superseded the Agreements as to those subjects. In short, these statutes were to be treated the same as all other federal statutes.

Given these principles, there is no warrant for singling out statutes modified by Congress to implement the Agreements for exclusion from agency compliance under the APA.

This problem is not a matter of isolated interest. As noted, the Act amended or modified some two hundred and fifty sections of the United States Code. Other international agreements have similarly modified many federal statutes when Congress implemented their provisions. In the North American Free Trade Agreement Implementation Act (NAFTA), for example, Congress amended or modified approximately two hundred sections of the Code. Pub.L. 103-182, 107 Stat. 2057 (1993). NAFTA contains identically-worded prohibitions on judicial review of agency compliance with the NAFTA Agreements themselves, but no language precluding review for consistency with statutes Congress modified to implement NAFTA. 19 U.S.C. § 3312.

The reasoning of the Courts below would exempt from judicial review under the APA a multitude of agency actions inconsistent with hundreds of statutes. There is nothing in the language of the Act, its legislative history, or other international trade agreements such as NAFTA to indicate Congress intended this result. The error below has permitted an administrative agency regulation with a 1986 grandfather date to supersede an Act of Congress establishing a 1996 grandfather date for continued use of geographic trademarks on wine labels.

CONCLUSION

The Court should grant certiorari, reverse the determination that the Act precludes review under the APA, and return this matter to the Court of Appeals with directions to proceed to the merits of Petitioner's APA claim that ATF acted inconsistently with the Lanham Act.

Dated: July 9, 1999

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRONCO WINE COMPANY, a California corporation, Plaintiff-Appellant, v. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS; JOHN W. MAGAW, Director of the Bureau of Alcohol, Tobacco and Firearms; GERARD W. LARUSSO, acting as Chief of the Alcohol and Tobacco Programs Division; EDWARD O'TOOLE, Special Operations Inspector of the Bureau of Alcohol, Tobacco and Firearms; JANET CALHOON, Group Supervisor of the Bureau of Alcohol, Tobacco and Firearms; UNITED STATES DEPARTMENT OF TREASURY, Defendants-Appellees.	No. 98-15444 D.C. No. CV-96-06354-REC MEMORANDUM[1] (Filed Feb. 11, 1999)

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, District Judge, Presiding

Argued and Submitted February 8, 1999
San Francisco, California

Before: WOOD[2], THOMPSON and THOMAS, Circuit Judges.

Bronco Wine Company ("Bronco") appeals the dismissal of its suit against the U.S. Bureau of Alcohol, Tobacco, and Firearms ("Bureau") and its agents. After consideration of the briefs, the record and the oral arguments presented by the parties, we affirm. Because the parties are familiar with the factual and procedural history of the case, we need not recount it here.

I

The district court correctly concluded that there is no private right of action afforded Bronco for the Lanham Act claims it asserts in this litigation. Although 15 U.S.C. § 1052 references registration of wine trademarks in the context of the Uruguay Round Agreement, the Lanham Act does not provide a cause of action under which Bronco could bring a claim. *See* 19 U.S.C.A. § 3512(c) (West 1994 & Supp. 1998) (stating that no one other than the United States "shall have a cause of action under the [Uruguay Round] Agreement"). Likewise, the Administrative Procedures Act ("APA") cannot be grounds for a

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[2] The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

Lanham Act claim because the APA specifically excludes review when a statute precludes judicial review. See 5 U.S.C. § 701(a)(1) (1994).

Bronco's theories against the Bureau based on the wine seizure and the warning letter advising Bronco that its use of the word "Rutherford" was contrary to federal regulations fail because neither act constituted a "final agency action" subject to judicial review under the APA. *See Bennett v. Spear*, 117 S.Ct. 1154, 1168 (1997) (stating that two conditions must be satisfied in order for agency action to be considered final agency action, first that the agency action "must mark the consummation of the agency's decisionmaking process," and second, that the action must "be one by which rights or obligations have been determined, or from which legal consequences will flow").

Thus, the district court properly dismissed Bronco's claims against the Bureau.

II

The district court also properly held that the individual Bureau agents were entitled to qualified immunity, barring Bronco's claims against them. Qualified immunity analysis requires (1) an identification of the right at issue; (2) a determination as to whether the identified right was so clearly established that a reasonable officer would have been alerted to its constitutional parameters; and (3) an assessment as to whether a reasonable officer would have believed the conduct at issue was lawful. *See V-1 Oil Co. v. Smith*, 114 F.3d 854, 857 (9th Cir. 1997). In determining what rights were "clearly established" at the

time of the seizure, we survey the legal landscape as it existed at the time, examining cases that are most like the case at bar. *See Figueroa v. United States*, 7 F.3d 1405, 1409 (9th Cir. 1993). In the absence of binding precedent, we look to all available decisional law. *Id.*

Bronco cannot cite any controlling decisional authority, nor any which might indicate that the law which it argues supports its position was "clearly established" in this instance. Bronco's reliance upon *Cabo Distributing Co. v. Brady*, 821 F.Supp. 601 (N.D. Cal. 1992), is misplaced because it involved revocation of a certificate of label approval, not a summary seizure. *See id.* at 607. To the contrary, the defendants cite instances in which summary seizures have been upheld in a number of contexts. *See, e.g., United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 601 (1950). Thus, at the time of the seizures, the law was not "clearly established" that summary seizures of alcohol based on a reasonable suspicion of mislabeling in violation of applicable regulations was unconstitutional. Accordingly, the district court properly granted the individual officers qualified immunity.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRONCO WINE COMPANY, a California corporation, Plaintiff-Appellant, v. BUREAU OF ALCOHOL, TOBACCO AND FIREARMS; JOHN W. MAGAW, Director of the Bureau of Alcohol, Tobacco and Firearms; GERARD W. LARUSSO, acting as Chief of the Alcohol and Tobacco Programs Division; EDWARD O'TOOLE, Special Operations Inspector of the Bureau of Alcohol, Tobacco and Firearms; JANET CALHOON, Group Supervisor of the Bureau of Alcohol, Tobacco and Firearms; UNITED STATES DEPARTMENT OF TREASURY, Defendants-Appellees.	No. 98-15444 D.C. No. CV-96-06354-REC ORDER (Filed Apr. 13, 1999)

Before: WOOD[1], THOMPSON and THOMAS, Circuit Judges.

The appellant's petition for rehearing is DENIED.

[1] The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

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BRONCO WINE COMPANY, a California corporation,

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX

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1988

BRONCO WINE COMPANY, Plaintiff,

v.

UNITED STATES DEPARTMENT OF TREASURY, the Bureau of Alcohol, Tobacco and Firearms, Defendants.

No. CV-F-96-6354 REC DLB.*

United States District Court, E.D. California.

Aug. 1, 1997.

[1319] Malcolm S. Segal, Segal & Kirby, Sacramento, CA, Frank C. Damrell, Jr., Damrell, Nelson, Schrimp, Pallios, and Ladine, Modesto, CA, E. Vincent O'Brien, Buchman and O'Brien, for Plaintiff.

D. E. Bensing, U.S. Dept. of Justice, Washington, DC, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

COYLE, District Judge.

In December of 1996, this court issued an order denying Plaintiff Bronco Wine Company's Motion for Temporary Restraining Order ("TRO"). Plaintiff had argued that Defendant Bureau of Alcohol, Tobacco and Firearms ("BATF" or "the Agency") should be enjoined from restricting the sale and distribution of its wine across the nation. In rejecting Plaintiff's argument, this court held that not only did Plaintiff fail to show that irreparable harm would result absent the issuance of a TRO, but also

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* Cite as 997 F.Supp. 1318.

that Plaintiff had not demonstrated that it was likely to succeed on the merits of its various constitutional and statutory claims. The time has now come for this court to actually entertain the merits of Plaintiff's arguments. This time around, however, the merits are somewhat different than were presented in December. And this time, Bronco has named several other individual defendants to its suit.[1]

The focus of this case involves the BATF's decision to promulgate and enforce regulations relating to the labeling of wine. Specifically, the regulations strictly require wine producers to provide the appellation of origin or a statement describing the origin of the grapes used in each bottle of wine. The BATF's regulations, and their particular effect on Bronco will be described in detail below. First, however, it is necessary to review the facts giving rise to this suit.

I. Factual Background

The factual background of this case is far more simple than the legal issues it presents. [1320] In 1994, Bronco purchased the Rutherford Vineyards trade name. The same year, one of its bottlers applied for and received approval from the BATF of Certificates of Label Authority ("COLAs") to produce wine under the Rutherford Vineyards trade name. The COLAs contained an additional

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[1] The named individual defendants include John W. Magaw, Director of the BATF, Gerard W. Larusso, Acting Chief of the Alcohol and Tobacco Programs Division, Edward O'Toole, Special Operations Inspector of the BATF, and Janet Calhoon, Group Supervisor of the BATF.

appellation of "Napa Valley." From 1995 to 1996, Bronco's bottlers submitted at least eleven new COLA applications that were approved by BATF. These COLA applications had a "California" appellation instead of the earlier "Napa Valley" appellations. In reliance on these COLAs, Bronco sold wine with either the Napa Valley or California appellations on its bottles. However, at all times, as a part of the brand name, the bottles contained reference to "Rutherford," a separate appellation of origin.

On October 7, 1996, the BATF issued a detention order and seized approximately 32,000 cases of Rutherford Vineyards wine. The detention order was issued pursuant to 26 U.S.C. § 5311. On October 10, 1996, the BATF released the detained wine, but issued a formal warning to Bronco and its bottling companies that any further bottling of Rutherford Vineyards wine or sales in interstate or foreign commerce would be considered willful violation of federal law, particularly 27 C.F.R. § 4.39(i). Notwithstanding attempts by Bronco to resolve this issue directly with the BATF, on December 11, 1996, the BATF issued its final decision confirming its restrictions against the sales of Rutherford Vineyards wines.

Although several events in this litigation have transpired since the BATF's final decision, none are worth reviewing in detail for the purpose of the instant motion. On March 17, 1997, Bronco filed its First Amended Complaint. The Complaint essentially states four separate claims, and is filed against the BATF, and several of its officers. The Complaint alleges that (1) the BATF regulation pertaining to misleading geographic brand names, 27 C.F.R. § 4.39(i) is arbitrary and capricious under the Administrative Procedures Act, 5 U.S.C. § 706(2)(B); (2)

the regulation is inconsistent with the Lanham Act, 15 U.S.C. § 1052(a); (3) that the regulation deprives Plaintiff of the use of its trade name without due process of law; and (4) that the three individually named Defendants violated Plaintiff's due process rights. Defendants now move to dismiss this Complaint. Upon careful review of the oral and written record, the court hereby grants in part and denies in part Defendants' motion to dismiss, consistent with the opinion herein.

II. Statutory Framework

The Federal Alcohol Administration Act ("FAAA"), codified in 27 U.S.C. § 201, et seq., establishes the regulatory scheme which governs the bottling, packaging and labeling of its wine. Passed in 1935, the legislative intent of the FAAA was to prohibit practices in the alcoholic beverages industry "that Congress had judged to be unfair and deceptive, resulting in harm to both competitors and consumers." *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1547 (10th Cir.1991). The BATF is the agency authorized by the FAAA to promulgate regulations which further the policies expressed in the statute. The regulations are found in title 27 of the Code of Federal Regulations, and provide that the BATF is to reject labels which convey erroneous information as to the age, identity, origin or other characteristics of the produce in question. 27 C.F.R. § 5.34.

The regulations in Title 27 set forth the conditions for use of an appellation of origin on a wine label. Section 4.25a(e) provides that an American viticultural area, (which is a delimited grape growing region whose

boundaries have been recognized and defined in another part of the chapter), may be used as an appellation of origin only if the appellation has been approved under Part 9 of the regulations, and not less than 85 percent of the wine is derived from grapes grown within the boundaries of the viticultural area. Directly relevant to the instant action is Section 4.39(i), which regulates the use of brand names of viticultural significance. "Rutherford Vineyards" is one such brand name, as it incorporates the name of a viticultural area[2] as part of the brand name. Section 4.39(i) provides:

> [1321] (1) Except as provided in subparagraph 2, a brand name of viticultural significance may not be used unless the wine meets the appellation of origin requirements for the geographic name.
>
> (2) For brand names used in existing certificates of label approval [COLAs] issued prior to July 7, 1986:
>
> > (i) The wine shall meet the appellation of origin requirements for the geographic area named; or
> >
> > (ii) The wine shall be labeled with an appellation of origin, in accordance with § 4.34(b) as to location and size of type of either:
> >
> > > (A) A county or viticultural area, if the brand name bears the name of a geographic area smaller than a state, or

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[2] The name "Rutherford" was approved as an American Viticultural area in 1993. *See* 27 C.F.R. § 9.133.

> (B) A state, a county, or a viticultural area, if the brand name bears a state name; or
>
> (iii) The wine shall be labeled with some other statement which the Director [of the BATF] finds to be sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.

In a nutshell, § 4.39(i) provides that a brand name of viticultural significance may not be used unless the wine either (1) meets the appellation of origin requirements for the geographic area named; (2) is "grandfathered," in that the brand name is one for which a COLA was issued prior to July 7, 1986, and is qualified with an appellation of origin; or (3) is grandfathered (in the same manner above), and the Director of the BATF decides that some other statement is sufficient to dispel the suggestion that the geographic area suggested by the brand name is indicative of the origin of the wine.

In concluding that Bronco was not complying with § 4.39(i), the BATF first noted that the Rutherford wines with the "California" appellations did not meet the appellation of origin requirements of the Rutherford viticultural area. The Agency further reasoned that neither of the grandfathering provisions applied to Rutherford Vineyards since the BATF's search revealed that no brand name of "Rutherford Vineyards" was ever used on COLAs issued prior to July 6, 1986. Moreover, the BATF recognized that even if the grandfathering provisions had applied to Rutherford Vineyards wines, Bronco would still not be in compliance with § 4.39(i). Because the labels

in question neither bear a county or viticultural area appellation of origin nor any other statement to dispel the suggestion that the wines are from the Rutherford area, the grandfathering provisions had not been satisfied. Simply stated, the BATF informed Bronco that the Rutherford Vineyards brand name may only be used to label wines which are entitled to the Rutherford appellation of origin. In other words, the Rutherford Vineyards brand name may not be applied to bottles unless 85 percent of the wine in the bottles is made from grapes grown in Rutherford.

III. Defendants' Arguments In Support Of Motion To Dismiss

Defendants move to dismiss Plaintiff's Complaint for various reasons. First, Defendants argue that Bronco cannot maintain a private cause of action against an agency of the United States under the Lanham Act. Second, Defendants argue that Section 4.39(i) is not arbitrary or capricious, and is an agency decision entitled to judicial deference. Moreover, Defendants contend that Bronco's procedural due process claim should be dismissed because Bronco has not been deprived of any property right, and that Bronco has been afforded ample process for acts taken by the Agency in conjunction with the Rutherford Vineyards wines. Finally, Defendants argue that the individual BATF defendants should be dismissed from this action because they are entitled to qualified immunity. Each of these arguments will be addressed in turn.

A. Lanham Act

Plaintiff first argues that the BATF's actions are in violation of the Lanham Act, 15 U.S.C. § 1052(a). Bronco argues that Section [1322] 1052(a) provides that the geographic misdiscriptiveness of a trademark used on a wine label does not bar registration if the trademark meets the other applicable criteria. Section 1052(a) states, in pertinent part:

> No trademark . . . shall be refused registration . . . unless it . . . consists of a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after [January 1, 1996].

Thus, by declaring that geographic misdiscriptiveness is illegal, the BATF has erected a bar to registration that thwarts Congressional will, Plaintiff urges. Furthermore, the Statement of Administrative Action makes clear the BATF's duty to amend its regulations to treat geographically misdiscriptive statements consistent with the intent expressed in the Agreement: "The United States will implement the Agreement's provisions on geographical indications for wine and spirits through the labeling regulations of the Bureau of Alcohol, Tobacco and Firearms of the Department of Treasury. The Agreement specifically recognizes that the rights in geographic indications of wine and spirits may be enforced through administrative action." 1994 U.S.Code Cong. & Admin. News at 4299.

However, as Defendants point out, the portion of the Lanham Act upon which Plaintiff relies does not provide a private cause of action against an agency of the United States. Section 1052(a) was amended as a part of the Uruguay Round Agreements Act of 1994, Pub.L. 103-465, 108 Stat. 4809. This statute was enacted to implement the trade agreements concluded in the Uruguay round of trade talks. The purpose of this provision was to ensure that U.S. trademark law complied with particular provisions of the Agreement on Trade Related Aspects of Intellectual Property under the Uruguay Round. Left untouched were existing provisions of the U.S. law on geographic names, such as 15 U.S.C. § 1052(e) and the FAAA.

That there is no private cause of action is clear, Defendants insist. Section 102(c) of the Uruguay Round Agreements Act, 19 U.S.C. § 3512(c), bars any person other than the United States from having any cause of action under the Uruguay Round Agreements and the enabling legislation:

> No person other than the United States –
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

Bronco's related argument, that the instant action is brought under the APA, rather than the Uruguay Round Agreements Act, cannot carry the day. Although at first glance it seems plausible, a careful review reveals its flaws. It is true that generally the APA provides a cause of action for parties who challenge an agency decision as violative of a law. However, in the case at hand, the law which Bronco points to, the Uruguay Round Agreements Act, clearly and unambiguously states that there may be no action by a private party, brought under any law, to enforce its provisions. Simply put, the provision of the Uruguay Round Agreements Act which strips private plaintiffs of a cause of action trumps the Administrative Procedures Act's grant of a cause of action.

Furthermore, even if there was a private cause of action, Plaintiff has misread the Lanham Act, the Agency urges. The statute addresses the circumstances under which trademarks may or may not be registered with the Office of Patents and Trademarks, and does not impliedly override otherwise valid federal laws and regulations. Indeed, 19 U.S.C. § 3512(a)(2) makes this point abundantly clear – it specifically provides that the Agreements and the associated enabling legislation shall not be "construed . . . to amend or modify any law of the United States."

The court does not address Plaintiff's Lanham Act claim on the merits because the [1323] court is satisfied that Plaintiff cannot bring a cause of action under the Lanham Act at all.

B. Arbitrary and Capricious Regulations

Bronco additionally challenges the BATF's geographic brand name regulation, 27 C.F.R. § 4.39(i). Defendant first argues that this argument is not encompassed within the reading of Bronco's First Amended Complaint, and thus should be rejected out of hand. The court refuses to do so. The Complaint alleges: "Defendants' decision to deprive Bronco of the right to use and rely upon its Rutherford Vineyards trademark, trade name and other property interests in bottling, labeling, and distributing Rutherford Vineyards wine is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law' in violation of the APA." Complaint, at 4. The Complaint continues by describing Bronco's injuries as a result of Defendants' decision to enforce Section 4.39(i). Under the liberal standards of notice pleading, this statement, although inartful, is sufficient to state a challenge to Section 4.39(i) as violative of the APA.

Defendants readily concede that their motion does not address a direct challenge of Section 4.39(i). In their Reply Brief, Defendants inform the court that "[w]ere such a claim properly presented, BATF would compile the rulemaking record for the regulations in question [ ] and the court would then determine if the regulations had a rational basis under traditional APA standards . . . However, at this juncture, BATF will limit its discussion to Bronco's argument that it lacks statutory authority to promulgate viticultural area regulations." Reply Brief, at 20. It appears from Plaintiff's Opposition to Defendant's Motion to Dismiss, that Plaintiff does indeed challenge the BATF's regulations. However,

because Defendant has not addressed the issue of whether the regulations are arbitrary, the court will not, at this time, grant Defendants' motion to dismiss this claim.

Defendants continue by addressing Bronco's related argument that the BATF has limited authority pursuant to 27 U.S.C. § 205(e)(5) to regulate "brand names." 27 U.S.C. § 205(e)(5) provides, in pertinent part, that the FAAA authorizes regulations:

> with respect to . . . labeling . . . (1) as will prohibit deception of the consumer with respect to such products or the quantity thereof and as will prohibit irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Secretary of Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof . . . , the net contents of the package, and the manufacturer or bottler or importer of the product; . . . (4) as will prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene or indecent; (5) as will prevent deception of the consumer by use of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization. . . .

Bronco reads this provision to create a distinction between the regulation of "statements" and "brand names." Plaintiff argues that while the BATF can regulate statements which create the possibility of consumer deception, it cannot regulate brand names, and by doing

so, it has acted arbitrarily. Plaintiff's position is rejected. As the BATF points out, 27 U.S.C. § 205(e)(1) and (2) authorize the BATF to promulgate regulations which both prohibit consumer deception, and provide information to consumers with regard to, among other things, the identity and quality of wines.

C. Procedural Due Process Claim

Bronco additionally argues that its right to procedural due process has been violated. In so arguing, Bronco seems to be attacking both the BATF's summary detention of the near 32,000 cases of wine, and its subsequent act of informing Bronco that it might risk suspension of its basic permit should it continue to disregard the Agency's regulations. Defendants counter Plaintiff's argument on two separate and persuasive grounds. First, Defendants point to regulations which authorize [1324] a summary detention and assert that such detentions are constitutionally permissible. Second, Defendants note that aside from the detention, no property interest has yet been deprived, and thus due process rights have not been implicated.

1. The Detention of Wine

The BATF notes that its authority to summarily detain the wine is found in 26 U.S.C. § 5311. Section 5311 provides:

> It shall be lawful for any internal revenue officer to detain any container, containing or supposed to contain, distilled spirits, wines, or beer, when

> he has reason to believe that the tax imposed on such distilled spirits, wines or beer has not been paid or determined as required by law, or that such container is being removed in violation of law; and every such container may be held by him at a safe place until it shall be determined whether the property so detained is liable by law to be proceeded against for forfeiture; but such summary detention shall not continue in any case longer than 72 hours without process of law or intervention of the officer to whom such detention is to be reported.

Consistent with this provision, the BATF detained 32,000 cases of wine for 72 hours. Once this time period expired, the BATF lifted the detention.

Bronco argues that this section is inapplicable because it refers to seizures by Internal Revenue officers of wine for which no taxes have been paid. Furthermore, Plaintiff asserts that the statement which allows summary detention of a "container [ ] being removed in violation of law" is equally inapplicable because the word "removed" is a tax assessor's term of art. Moreover, because the BATF's authority stems not from the Internal Revenue Code ("IRC"), but rather from the FAAA, Defendants' reliance on Section 5311 is misplaced, Plaintiff urges. Finally, because the FAAA only authorizes regulation of interstate sales, the BATF agents overstepped their bounds by regulating intrastate sales in addition to interstate sales.

Plaintiff's position is again misguided. The plain language of Section 5311 is not limited to authorizing detentions for the failure to pay taxes, but rather extends to instances where containers are removed in violation of

law. Forfeiture can result from regulatory violations of the IRC, Defendant notes. And the regulations relating to wine, found at 27 C.F.R. Part 24, specifically provide that they are promulgated under the authority of the Internal Revenue Code.

In addition, Plaintiff's groundless assertion that only internal revenue officers may exercise the power described in Section 5311 should also be rejected, the Agency insists. BATF inspectors are vested with all the powers and responsibilities of "internal revenue officers" including those found in Section 5311. In 1972, when the BATF was established as a separate Bureau, the Acting Secretary of Treasury expressly delegated internal revenue powers to the BATF and its officers. *See* Treasury Department Order No. 120-01, 37 Fed.Reg. 11696 (June 10, 1972). Paragraph 5(c) of the Treasury Department's Order expressly states that the term "internal revenue officer" shall include all officers and employees engaged in enforcing the laws administered by the BATF.

Equally meritless is Plaintiff's assertion that the term "removal" is a tax assessor's term of art. In their Reply Brief, Defendants cite several instances of the use of the term in other contexts. Plaintiff's failure to provide the court with persuasive reasons for concluding that "removal" is a term of art coupled with Defendants' citation of the term in other contexts suggests that this court should follow Defendants' interpretation of the provision.

Finally, Plaintiff's argument that the BATF exceeded its authority by detaining intrastate sales is also unavailing. Since the BATF's detainer authority provided in Section 5311 is grounded in the IRC rather than the FAAA, in detaining intrastate sales, the BATF properly exercised its authority, the Agency insists. Accordingly, Plaintiff's arguments should all be rejected, Defendants conclude. The court agrees.

Even if Defendants properly exercised their authority under Section 5311, Plaintiffs might still have an argument that [1325] the summary detention of the cases of wine was unconstitutional. Before depriving a person of a property interest, due process requires that an agency give him adequate notice that a decision is being considered and an opportunity for a hearing. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Thus, the issue is whether the government should have provided Bronco with notice and a hearing before detaining the wine. Defendants correctly note that notwithstanding the requirements of due process, exceptions exist for summary governmental actions which are taken pursuant to police powers. *See Gun South, Inc. v. Brady*, 877 F.2d 858, 867-68 (11th Cir.1989). This is particularly true for industries which are heavily regulated, such as the alcohol industry. *Id.* Moreover, both the Supreme Court and the Ninth Circuit have recognized that, in the interest of public health, the government may seize mislabeled and misbranded products without a hearing being afforded to the property owner. *See Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950); *U.S. v. Argent Chemical Laboratories, Inc.*, 93 F.3d 572, 576 (9th Cir.1996).

In the end, this court concludes that Bronco's due process rights were not violated by the detention. It was done upon the BATF agents' reasonable belief that its regulations were being violated. Such violations did in fact occur. The length of the detention was also not unreasonable – after 72 hours, the detention was lifted. In light of the BATF's duty to ensure that consumers are not deceived, the court is satisfied that the BATF's actions pass constitutional muster.

2. The October 10, 1996 Warning Letter

Bronco further asserts that the October 10, 1996 warning letter sent by Defendant LaRusso, wherein Bronco was warned that any sale or shipment of the Rutherford Vineyards wines would constitute a "willful violation of the FAAA," violated its right to due process. Specifically, Bronco asserts that the BATF's decision effectively revoked COLAs issued to Bronco without notice and a hearing.

Plaintiff's argument is rejected. The BATF has always maintained, and continues to maintain, that the COLAs in question have not been revoked. To the contrary, Rutherford Vineyards wine may be sold, as long as it complies with the Agency's regulations. An agency's decision to enforce regulations whose effect may be more stringent than envisioned by a plaintiff does not amount to a violation of due process. To so conclude would effectively eviscerate the enforcement powers of the agency which are so central to its functions.

That there was no due process violation in this case is clear for another reason. The BATF's letter simply

informed Bronco of steps it might take should Bronco continue to engage in activity that the Agency believed would violate the law. At this point, no property interest had been deprived. In fact, no action has been taken against Bronco's basic permit, and if it were, the BATF assures the court that Bronco would be provided with extensive procedural protections. Indeed, the Agency did not even have to provide such a warning – it could have taken final action, and then provide a hearing later. That it chose to inform Bronco of its errors should not inure to the detriment of the government. Thus the only function that this letter served is to make this case ripe for judicial review. However, it did not implicate the Due Process Clause because no property right had been deprived.

Simply put, Defendants' motion to dismiss Bronco's procedural due process claim is granted.

D. Bivens Claims Against Individual Defendants

Bronco's final claim is asserted against the individual BATF agents. Plaintiff claims that these individuals violated Bronco's due process rights by seizing the wine and constructively revoking the COLAs. At the outset, this claim is dismissed, because, as discussed above, there is no underlying due process violation.

Even if there were a due process violation, however, the individual defendants would still be dismissed because they are entitled to a [1326] defense of qualified immunity. In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Supreme Court made clear that a government official performing discretionary functions is immune from civil

suit unless he violates a clearly established constitutional or statutory right that an official in his position would reasonably be aware of. Thus, whether a defendant is entitled to qualified immunity involves two distinct inquiries: (1) was the right that was violated "clearly established"; and (2) did the defendant act reasonably from an objective standpoint.

Because there is a dearth of cases involving either Section 4.39(i) of Section 5311 of the IRC, Defendants correctly assert that Bronco's alleged right to be free from detention and to avoid the requirements of the BATF's regulations could not be "clearly established." Indeed, no court has ever held that section 4.39(i) is invalid or preempted by any other law, including the Lanham Act. Likewise, no court has ever held that 26 U.S.C. § 5311 cannot be used to detain mislabeled wine, or that a winemaker is entitled to a hearing prior to such detention. As a result, the individual defendants could not have violated clearly established law, and are also dismissed on this ground.

Accordingly, IT IS ORDERED that:

(1) Defendants' Motion to Dismiss Plaintiff's Lanham Act claim is GRANTED, WITH PREJUDICE;

(2) Defendants' Motion to Dismiss Plaintiff's challenge to Section 4.39(i) as arbitrary and capricious under the APA is DENIED;

(3) Defendant's Motion to Dismiss Plaintiff's procedural due process claim is GRANTED, WITH PREJUDICE;

(4) Defendants Larusso, O'Toole and Calhoon are DISMISSED from this case.

Supreme Court, U.S.
FILED
SEP 15 1999
OFFICE OF THE CLERK

No. 99-119

In the Supreme Court of the United States

BRONCO WINE COMPANY, PETITIONER

v.

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 19 U.S.C. 3512(c) precludes judicial review of petitioner's claim that 27 C.F.R. 4.39(i) is inconsistent with 15 U.S.C. 1052(a).

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BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is unpublished, but the decision is noted at 168 F.3d 498 (Table). The opinion of the district court (Supp. Pet. App. 1-19) is reported at 997 F. Supp. 1318.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1999. The petition for rehearing was denied on April 13, 1999 (Pet. App. 5). The petition for a writ of certiorari was filed on July 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Alcohol Administration Act (FAAA), 27 U.S.C. 201 *et seq.*, makes it unlawful to ship, sell or deliver wine in interstate or foreign commerce unless such wine is labeled in conformity with Bureau of Alcohol, Tobacco and Firearms (ATF) regulations designed to prevent consumer deception. 27 U.S.C. 205(e). The statute further declares that no person may bottle or package wine unless he or she has obtained from ATF a "Certificate of Label Approval" (COLA), or has obtained a certificate of exemption after certifying that the bottled wine will be sold only in intrastate commerce. 27 U.S.C. 205(e); 27 C.F.R. 4.50.[1]

This case concerns ATF regulations regarding wine labels that use geographic names of "viticultural significance." See 27 C.F.R. 4.39(i)(3). Beginning in 1978, members of the American wine industry were granted the right to petition ATF to have select geographical areas designated as areas of viticultural significance or distinctiveness. The primary purpose of such a designation is to enable consumers to better identify the origin of the wines they purchase. See 43 Fed. Reg. 37,672 (1978). When such a viticultural area is approved by ATF pursuant to 27 C.F.R. Part 9, it may be used as an appellation of geographic origin on wine labels if "[n]ot less than 85 percent of the wine is

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[1] All persons engaged in the business of producing, blending or bottling wine must do so pursuant to a "basic permit" issued by the Secretary of the Treasury, through his delegate, the Director of the Bureau of Alcohol, Tobacco and Firearms (ATF). 27 U.S.C. 203(b); 27 C.F.R. 1.21. Violation of the FAAA or its implementing regulations can be grounds for suspension or revocation of the basic permit. 27 U.S.C. 204.

derived from grapes grown within the boundaries of the viticultural area." 27 C.F.R. 4.25a(e)(3)(ii).[2]

ATF regulations also prohibit the use of false or misleading information on wine labels, including misleading geographic brand names. The brand name, usually the most prominent item on a wine label, conveys significant information to a consumer. See 51 Fed. Reg. 20,480 (1986). Accordingly, 27 C.F.R. 4.39(i) provides as follows:

> [A] brand name of viticultural significance may not be used unless the wine meets the appellation of origin requirements for the geographic area named.

Section 4.39(i)(2) also contains a "grandfathering" provision for COLAs issued prior to July 7, 1986.[3]

b. In 1994, Congress passed the Uruguay Round Agreements Act of 1994 (the Uruguay Round Act), Pub. L. No. 103-465, 108 Stat. 4809. Among other

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[2] ATF regulations provide that a wine may be labeled with a varietal type designation (*e.g.*, cabernet sauvignon) only if it is also labeled with an appellation of origin of the grapes. 27 C.F.R. 4.23(a). In addition to approved viticultural areas, appellations of origin for American wines include the United States, a State, a county, or multi-state or multi-county appellations. 27 C.F.R. 4.25a(a).

[3] Under the grandfathering provision, a brand name of viticultural significance may be used if any one of three conditions is met: (1) the wine meets the 85% appellation of origin requirement, 27 C.F.R. 4.39(i)(2)(i); (2) the wine is labeled in such manner as to identify the actual county or viticultural area from which the wine is derived and the brand name uses a geographic area smaller than a State, 27 C.F.R. 4.39(i)(2)(ii); or (3) the wine is labeled with some other statement that ATF finds sufficient to dispel any potentially misleading impression of origin that might be created by the use of an area of viticultural significance in the brand name, 27 C.F.R. 4.39(i)(2)(iii).

things, the Uruguay Round Act amended the Lanham Act, 15 U.S.C. 1052(a), which governs federal registration of trademarks. As amended by the Uruguay Round Act, Section 1052(a) provides in relevant part:

> No trade-mark * * * shall be refused registration * * * unless it—(a) Consists of * * * a geographical indication which, when used on or in connection with wines or spirits, identifies a place other than the origin of the goods and is first used on or in connection with wines or spirits by the applicant on or after [January 1, 1996].

15 U.S.C. 1052(a) (quoted Supp. Pet. App. 8). The Uruguay Round Act, however, also limits the extent to which private citizens may invoke or rely on its provisions. In particular, Section 102(c)(1) of the Uruguay Round Act provides:

> No person other than the United States —
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, * * * on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. 3512(c)(1).

2. The "Rutherford" area of California's Napa Valley was designated by ATF as an area of viticultural significance in 1993. See 27 C.F.R. 9.133. Shortly thereafter, in 1994, petitioner Bronco Wine Company

purchased the "Rutherford Vineyards" brand name.[4] Supp. Pet. App. 2. That same year, ATF approved several COLAs for Rutherford Vineyards brand wine; those COLAs contained the appellation of origin "Napa Valley" in conjunction with the varietal designation. *Id.* at 2-3. Between 1995 and 1996, petitioner's bottlers submitted at least 11 new COLA applications that were approved by ATF, with a "California" appellation of origin in lieu of the earlier "Napa Valley" appellation. *Id.* at 3. At all relevant times, as a part of the brand name, the bottles contained reference to "Rutherford," a distinct viticultural area and appellation of origin. It is undisputed that the wine inside the bottle was not made from grapes grown in the Rutherford region of the Napa Valley and thus did not satisfy the requirements of 27 C.F.R. 4.39(i).

Accordingly, on October 7, 1996, ATF inspectors issued a 72-hour summary detention order, pursuant to 26 U.S.C. 5311, detaining approximately 32,000 cases of Rutherford Vineyards wine for failure to comply with the labeling requirements of 27 C.F.R. 4.39(i). Supp. Pet. App. 3. In accordance with the provisions of 26 U.S.C. 5311, the detention order was lifted at the end of 72 hours. Supp. Pet. App. 3.

Petitioner filed this civil action in the United States District Court for the Eastern District of California, seeking declaratory and injunctive relief and damages. Among other things, petitioner contended that ATF's regulations concerning the use of geographic brand names of viticultural significance, 27 C.F.R. 4.39(i), is inconsistent with the Lanham Act, 15 U.S.C. 1052(a), as

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[4] Because petitioner does not have a pre-July 1986 COLA for the "Rutherford Vineyards" name, the grandfather clause of 27 C.F.R. 4.39(i) is not relevant here.

amended by the Uruguay Round Act. See Supp. Pet. App. 3-4. According to petitioner, ATF's regulations cannot prohibit the use of misdescriptive or misleading distinctive *viticultural area brand names* on wine *labels* because Section 1052(a) permits geographically misdescriptive names to be registered as *trademarks* where the name was used before January 1, 1996. Petitioner contends that ATF should have amended its regulations concerning brand names and areas of viticultural significance to correspond to the amendment to the trademark law mandated by the Uruguay Round Agreement that Congress implemented in the Uruguay Round Act.

The district court rejected petitioner's claim. Section 1052(a), the district court noted, was added to the Lanham Act as part of the Uruguay Round Act. Supp. Pet. App. 9. Section 102(c) of that Act, 19 U.S.C. 3512(c), specifies that the Act does not create a right of action or defense against the United States, or otherwise permit challenges to the actions or inaction of United States agencies or departments. *Ibid.* "[T]he portion of the Lanham Act upon which [petitioner] relies does not provide a private cause of action against an agency of the United States." Supp. Pet. App. 9. To the contrary, "[t]he purpose of this provision was to ensure that U.S. trademark law complied with particular provisions of the Agreement on Trade Related Aspects of Intellectual Property under the Uruguay Round," and it "[l]eft untouched * * * existing provisions of the U.S. law on geographic names, such as 15 U.S.C. § 1052(e) and the FAAA." Supp. Pet. App. 9.

The court rejected petitioner's reliance on the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, for the cause of action. Although the APA ordinarily permits individuals adversely affected by agency action

to challenge that action where there is no other adequate means of review, the court held that "the provision of the Uruguay Round Agreements Act which strips private plaintiffs of a cause of action trumps the Administrative Procedure Act's grant of a cause of action." Supp. Pet. App. 10. Accordingly, the court declined to reach the merits of petitioner's Lanham Act claim. *Ibid.*[5]

4. The court of appeals affirmed in an unpublished memorandum disposition. Pet. App. 1-4. Invoking 19 U.S.C. 3512(c), the court of appeals held that "there is no private right of action afforded Bronco for the Lanham Act claims it asserts in this litigation." Pet. App. 2. The court further stated that "[l]ikewise, the [APA] cannot be grounds for a Lanham Act claim because the APA specifically excludes review when a statute precludes judicial review." *Id.* at 2-3 (citing 5 U.S.C. 701(a)(1)).

ARGUMENT

Petitioner contends that the Uruguay Round Amendments Act of 1994 does not preclude it from challenging the Bureau of Alcohol, Tobacco and Firearm's regula-

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[5] The district court also rejected petitioner's claims that ATF's regulation deprives it of the use of its trade name without due process and that the three individually-named ATF officials violated petitioner's due process rights. See Supp. Pet. App. 13- 18. The court of appeals affirmed, Pet. App. 3-4, and petitioner does not raise any of those claims before this Court. The district court declined to dismiss petitioner's claim that ATF's geographical brand name regulation, 27 C.F.R. 4.39(i), is arbitrary and capricious under the APA, 5 U.S.C. 706(2)(B). Instead of pursuing that claim, however, petitioner filed a notice of voluntary dismissal of the action and appealed the district court's dismissal of its other claims. Accordingly, petitioner's arbitrary and capricious claim is not before this Court either.

tions concerning the use of areas of viticultural significance as brand names on wine labels, 27 C.F.R. 4.39(i), as inconsistent with the Uruguay Round Amendments to the Lanham Act. In particular, petitioner claims that the Administrative Procedure Act (APA), 5 U.S.C. 702, provides it with a cause of action notwithstanding Section 102(c)(1) of the Uruguay Round Act, 19 U.S.C. 3512(c)(1).

1. a. Petitioner concedes, as it must, that the APA does not provide a cause of action for judicial review "if [another] statute" by its terms "precludes it." Pet. 9. Relying on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), however, petitioner argues (Pet. 9-10) that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." 387 U.S. at 141.

As this Court has explained, it has never applied that clear and convincing standard "in the strict evidentiary sense," but rather "has found the standard met, and the presumption favoring judicial review overcome, whenever the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 350-351 (1984) (quoting *Association of Data Processing Serv. Organizations* v. *Camp*, 397 U.S. 150, 157 (1970)); accord, *United States* v. *Fausto*, 484 U.S. 439, 452 (1988). Indeed, the presumption favoring judicial review can be "overcome by inferences of intent drawn from the statutory scheme as a whole." *Community Nutrition Institute*, 467 U.S. at 349; *Fausto*, 484 U.S. at 452.

Here, the courts below found that that presumption was overcome by the clear text of 19 U.S.C. 3512(c)(1), which states in pertinent part:

> No person other than the United States—
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, * * * on the ground that such action or inaction is inconsistent with such agreement.

As the courts below both held, it is precisely such a forbidden challenge that petitioner is attempting to make here—*i.e.*, petitioner seeks to utilize that portion of the Lanham Act enacted as part of the Uruguay Rounds Act to challenge ATF's "inaction" in not amending its regulations pertaining to wine labeling and brand names that misleadingly incorporate an area of viticultural significance, 27 C.F.R. 4.39(i).

Petitioner's attempt to distinguish 19 U.S.C. 3512(c)(1) is not persuasive. Petitioner concedes that Section 3512(c)(1)(A) expressly bars "private rights of action" to enforce the Uruguay Round Agreements. But that barrier to suit, petitioner contends, does not apply to suits for judicial review under the APA, since the absence of a "private right of action under the statute challenged" does not preclude the same action from being brought under the APA. Pet. 10-11. Petitioner, however, ignores half of Section 3512(c)(1)(A)'s text. Section 3512(c)(1)(A) does not merely prohibit the recognition of causes of action or defenses "under" the Uruguay Round Agreements. Instead, it also declares that no individual "shall have *any* cause of action or

defense * * * *by virtue of* congressional approval of" the Uruguay Round Agreements (emphasis added). Manifestly, petitioner's cause of action—its very claim—arises solely because of (*i.e.*, by virtue of) congressional approval of the Uruguay Round Agreements. Indeed, absent Congress's approval of those Agreements in the Uruguay Round Act, the Lanham Act provision on which petitioner relies would not exist and petitioner would have no claim at all.[6] Because petitioner's claims arise "by virtue of" Congress's approval of the Uruguay Round Agreements in the Uruguay Round Act, those claims are barred by Section 3512(c)(1)(A).

Petitioner's suit is likewise precluded by Section 3512(c)(1)(B), which bars any suit, "under any provision of law," challenging agency "action or inaction" as inconsistent with the Uruguay Round Agreements. Seeking to evade the preclusive effect of Section 3512(c)(1)(B), petitioner argues (Pet 11-14) that it is not challenging ATF's actions as inconsistent with the Uruguay Round *Agreements*. Rather, petitioner insists, it is challenging ATF's action as inconsistent *with legislation implementing* the Uruguay Round Agreements. Whatever the merits of distinguishing between the Uruguay Round Agreements and the legislation implementing those agreements in the context of Section 3512(c)(1)(B), the distinction cannot help petitioner escape the scope of Section 3512(c)(1)(A), which bars causes of action "by virtue of" Congress's "approval" of the Uruguay Round Agreement, *i.e.*, by virtue of the

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[6] Only petitioner's claim specifically based on the amended Lanham Act provision is before this Court. Petitioner voluntarily dismissed its claim that ATF's regulation is arbitrary and expricious under the APA (see note 5, *supra*).

Uruguay Round Act. Moreover, even with respect to Section 3512(c)(1)(B), "the provision of the Uruguay Round Agreements Act which strips private plaintiffs of a cause of action trumps the Administrative Procedure Act's grant of a cause of action." Supp. Pet. App. 10. See also 5 U.S.C. 701(a) (APA applies "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law"); *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988) (CIA director's decision to terminate an employee is not subject to APA challenge on statutory grounds). Petitioner cannot use the APA as a mechanism for bypassing the review-precluding provision Congress established in Section 3512(c)(1). As the district court explained, Section 3512(c) bars private actions relating to the implementation of the Uruguay Round Agreements on the theory that ensuring proper implementation of those agreements—because they are *agreements between governments*—should be the sole responsibility of the United States government and not of private persons through judicial processes.

b. Even apart from the preclusion-of-review provisions, petitioner cannot prevail because its substantive claim lacks merit. Petitioner claims that ATF regulations, which bar it from using an area of viticultural significance as its brand name on wine labels if the grapes used in making the wine do not come from that area, conflicts with the Lanham Act, which permits geographically misdescriptive brand names to be registered as trademarks. See pp. 5-6, *supra*. But the fact that geographically misdescriptive brand names used before January 1, 1996 are eligible for trademark registration as a general matter does not mean that ATF's prohibition on the use of a particular sort of brand name—those referencing areas of viticultural

significance and that thus are especially likely to confuse—in the specific context of wine bottle labels is invalid.[7] To the contrary, the questions of which categories of brand names are eligible for registration under the Lanham Act for various uses, and when brand names of viticultural significance can be used on wine labels in accordance with ATF regulations, are separate issues. As the district court summarized:

> The [Uruguay Round Act amendment to the Lanham Act] addresses the circumstances under which trademarks may or may not be registered with the Office of Patents and Trademarks [but] does not impliedly override otherwise valid federal laws and regulations. Indeed, 19 U.S.C. § 3512(a)(2) makes this point abundantly clear—it specifically provides that the Agreements and the associated enabling legislation shall not be "construed . . . to amend or modify any law of the United States."

Supp. Pet. App. 10.

2. Petitioner, in any event, nowhere argues that the unpublished decision of the court of appeals creates a conflict in circuit authority. To the contrary, petitioner acknowledges that this is a case of first impression. See Pet. 9. Nonetheless, petitioner argues that the case warrants immediate review in light of the similar preclusion-of-review provision of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 19 U.S.C. 3312(c).

To our knowledge, however, no other cases involving either that provision or 19 U.S.C. 3512(c) have been

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[7] Brand names that are geographically misdescriptive but do not use an area of viticultural significance are not addressed by 42 C.F.R. 4.39(i).

brought. Moreover, even if such a case were brought, the unpublished decision of the court of appeals in this case would not have precedential consequences. See 9th Cir. R. 36-3; Pet. App. 1 n.1. Because the decision in this case neither creates a conflict in circuit authority nor raises an issue presently of manifest national importance, further review is not warranted. See Sup. Ct. R. 10(a) and (c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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